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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 107.

PAUL O. WEBER, PLAINTIFF IN ERROR,

vs.

CHARLES ROGAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED MAY 24, 1901.

(18,180.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1902.

1 *Original Petition for Mandamus.*

Filed Nov. 13, 1899.

STATE OF TEXAS,
County of Galveston.

To the honorable the supreme court of the State of Texas:

Your petitioner, P. O. Weber, a resident citizen of the county of Galveston, State of Texas, complaining of Charles Rogan, commissioner of the general land office of the State of Texas, in his capacity as such commissioner, respectfully represents to your honors:

That on the 11th day of August, 1899, said Charles Rogan was the duly appointed and qualified commissioner of the general land office of the State of Texas.

That your petitioner on the day and date last aforesaid being desirous to purchase some public lands belonging to the public school fund of the State of Texas, and which said State, through its laws, had then offered for sale, applied to the said commissioner of the general land office for the purchase of said lands at and for the price fixed by law for the same; and your petitioner otherwise fully complied with the terms of sale offered by the law authorizing him to become the purchaser from the State of Texas of said lands. That the lands so purchased by your petitioner are more fully described as follows:—

I.

Six hundred and forty acres of land situated in Polk county, Texas, and surveyed for the public free school fund by virtue of certificate No. $\frac{25}{280}$, issued to the H. & T. C. R'y Company, being survey No. 30.

II.

Three hundred and twenty acres of land in Jefferson county, Texas, surveyed for the public free school fund by virtue of certificate No. 205, issued to the Texas & New Orleans R'y Co., being the north half of survey No. 202. Each of the two aforesaid sections belonged on the said last-named date to the public school fund of the State of Texas and were at said time and still are detached and isolated from other public lands and are situated in counties or-

2 ganized prior to the 1st day of January, 1875.

That in applying for the purchase of the aforesaid lands your petitioner used the forms of application prepared for that purpose by the commissioner of the general land office together with the attorney general, as required by law, and filed his said application with the said commissioner of the general land office on the 11th day of August, 1899, and at the same time appended to said application the affidavit required by law to be made by applicants for the purchase of such lands, and paid to the treasurer of the State of Texas the sum required by law to be paid to the State in the pur-

chase of such kind and character of lands, and also filed with the commissioner of the general land office his obligation, payable to the State of Texas, for such balance and parts of the purchase price as by law are required to be paid in annual installments with interest at the rate of three per cent. per annum to the State. All of which said acts were done and performed in full and strict compliance with the law providing for the sale of all isolated and detached sections and fractions of sections of land situated in counties organized prior to the first day of January, 1875.

Your petitioner further avers that said commissioner of the general land office has rejected his said two applications and refuses to award said two sections of school land to petitioner in direct violation of the law, alleging as a pretended reason for his action that the said two sections so applied for to be purchased by your petitioner have heretofore been classified by the commissioner of the general land office,—the first as timber land, and the second as grazing land, and that the law is not applicable to sections of grazing and timbered land, but that all sections of land and fractions of sections in this State that are either classed as grazing or timber sections cannot be purchased under the law in force at the date of your petitioner's application for one dollar per acre, although such grazing and timber sections or fractions of sections are isolated and detached from other public lands and are situated in counties organized prior to the first day of January, 1875 (other than El Paso, Presidio and Pecos counties) and that there was at the date of the filing of
3 your petitioner's application no law in the State of Texas by and under which the commissioner of the general land office could lawfully have awarded the two aforesaid sections of land to your petitioner at the price of one dollar per acre offered therefor by your petitioner.

Now your petitioner avers it to be true that said two sections of land before and prior to the time that the same became isolated and detached were classified by the commissioner of the general land office, the one as timber land and the other as grazing land; but he says that such classification from and after the time that said lands became isolated and detached was and is no longer of any force or effect, because the provisions of the law requiring lands belonging to the public school fund to be classified do not relate or apply to isolated and detached sections or fractions of sections of such lands, situated in counties organized prior to the first day of January, 1875; but the price of such lands at the time petitioner applied therefor was fixed by law at one dollar per acre irrespective of any classification made of said lands either before or after the time they became isolated and detached, and that said classification is wholly useless and of no force and effect, and that by virtue of his acceptance of the terms of sale offered by said law itself, and by virtue of the filing of his application, affidavit and obligation with the commissioner of the general land office under the terms prescribed by law, and depositing with the said treasurer at the same time said several sums of money due the State of Texas for said sections of land, he became, in law, the purchaser of said two sections

of land (irrespective of said classification) and the commissioner of the general land office is without authority in law or equity to withhold from your petitioner his award of said lands, and by rejecting your petitioner's said application, he is acting in violation of the law and clouding your petitioner's title.

Wherefore, premises considered, plaintiff prays that the writ of mandamus issue to Charles Rogan, commissioner of the general land office of the State of Texas, commanding him that unless he show good cause to the contrary, that he do issue his award of sale to your petitioner for the said two surveys of land purchased by him from the State of Texas as aforesaid, for which your petitioner duly filed his application as aforesaid, and your petitioner be awarded all such other relief both general and special as he may show himself entitled to and recover all costs in this proceeding.

4

M. E. KLEBERG &
ASHBY S. JAMES,
Attorneys for Plaintiff.

STATE OF TEXAS, }
County of Galveston. }

Before me, the undersigned authority, on this day personally appeared J. R. Coryell, who being by me duly sworn on oath says that he is the duly authorized agent and attorney-in-fact of P. O. Weber, plaintiff in the foregoing suit, and that the facts set forth in the said plaintiff's petition are true.

J. R. CORYELL,
Agent & Attorney-in-fact for P. O. Weber.

Subscribed and sworn to before me, the undersigned authority, this 11th day of November, 1899.

[SEAL.]

F. W. BEISSNER,
Notary Public for Galveston County, Texas.

Endorsed: No. 838. P. O. Weber, relator, *v.* Chas. Rogan, commissioner general land office, respondent. Original petition for mandamus. Filed in supreme court by order of court November 13, 1899. Chas. S. Morse, clerk, by F. T. Connerly, deputy. M. E. Kleberg & Ashby S. James, for petitioner.

Respondent's Original Answer.

Filed Jan. 8, 1900.

In the Supreme Court of Texas, October Term, A. D. 1899.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner General Land Office, Respondent. } No. 838.

Now comes Chas. Rogan, commissioner of the general land office, respondent, by his attorneys herein, T. S. Smith, attorney general, and R. H. Ward, assistant attorney general, and demurs to the original petition of relator, and says that the same is insufficient in law, and shows no legal and sufficient grounds for the granting of the writ of mandamus prayed for.

And specially excepting to said petition, he says that the same is insufficient in law for the following reasons, to wit:

1st. Because it appears from the allegations of the petition that section 30 of 640 acres of land located by virtue of certificate No. 25/1280 in the name of the H. & T. C. R'y Co. and which relator seeks to purchase under art. 4218*y* of the act of 1897, (see Acts of 1897, p. 187) was classified as and was in fact timbered land and was valued at $8 per acre, and was not in fact, or classified, as agricultural land, and as said article 4218*y* only authorizes the commissioner of the land office to sell as detached land *agricultural* sections so detached, the law does not authorize the sale of said section 30 as a detached section, and the commissioner cannot be made by mandamus to make a sale of said section in violation of law.

2nd. Because it appears from the allegations in the petition that the north ½ of section 202 of 320 acres of land located by virtue of certificate No. 205 in the name of the T. & N. O. R'y Co. and which relator seeks to purchase under article 4218*y* of the act of 1897, p. 187, was classified as, and was in fact, grazing land and valued at $2.00 per acre, and was not in fact, or classified as, agricultural land, and as said article 4218*y* only authorizes the commissioner of the general land office to sell as detached land *agricultural* sections so detached, the law does not authorize the sale of said north ½ of section 202, as a detached section, and the commissioner cannot be made by mandamus to make a sale of said section in violation of law.

3rd. Because said article 4218*y* does not confer upon the citizen the absolute right to buy detached land, but provides that the same "*may* be sold," etc., thus giving the commissioner a discretion as to whether he will sell the same as detached land, which discretion cannot be controlled by the court. Of all of which respondent prays judgment of the court.

T. S. SMITH,
Attorney General, and
R. H. WARD,
Office Ass't Att'y Gen.,
Attorneys for Respondent, Chas. Rogan, Com.

6 First.

And should said demurrer and exceptions be overruled, for further answer to relator's petition, respondent says that it is true, as alleged by relator, that he made application to purchase the lands set forth in his petition, as alleged by him, which said applications were filed in the general land office. That the two applications to purchase said two tracts of land respectively were received and filed in the general land office on August 11th, 1899, certified copies of said two applications, together with all endorsements thereon, are hereto attached and marked respectively as Exhibits "A" and "B," and the same are hereby made a part of this answer. That this respondent refused to sell to relator section 30 in the name of H. & T. C. R'y Co. and located by virtue of certificate No. 25/1280 in accordance with said application for and on account of the following reasons, to wit: Because the same was applied for by relator at the price of one dollar per acre, $\frac{1}{10}$ cash, and the remainder payable in accordance with the requirements of the law, to be evidenced by his written obligation. That said land is pine-timbered land and is of the actual value of not less *the* (than) $8.00 per acre. That said land under the act of 1897 was classified according to law as pine-timbered land and valued at $8.00 per acre; that said classification and valuation were in strict conformity with the law and were in full force and effect before and at the time of the filing of the application of relator to purchase the same and *has* so remained ever since to the present time. That while said land was detached, it being in fact pine-timbered land, and not agricultural land, that he had no power to sell the same under article 4218*y* of the act of 1897, p. 187. This being his construction of the law, he refused to award said land to relator on his said application. Respondent further says that if the above construction of the law be wrong, then he further says that no writ of mandamus should be granted against him as to said section, because he says the law gives him a discretion as to whether he will sell said land or not, which discretion cannot be reviewed by the court. That it would be inequitable and unjust to the State to compel respondent to award said land to relator at the price of one dollar per acre when the fair reasonable market value of the same is not less than $8.00 per acre.

7 Second.

That as to said N. $\frac{1}{2}$ of section 202 located by virtue of certificate No. 205 in the name of the T. & N. O. R'y Co. for 320 acres of land, respondent says that he refused to sell the same to relator in accordance with his application (the same being Exhibit "B" attached to this answer) for and on account of the following reasons, to wit: 1st. Because the same was applied for by relator at the price of one dollar per acre, $\frac{1}{10}$ cash, and the remainder payable in accordance with the requirements of the law, to be evidenced by his written obligation. That said land is *grazing* land, and is of the actual value of $2.00 per acre. That said land was classified according to law as grazing land, and valued at $2.00 per acre; that said classi-

fication and valuation were in strict conformity with the law and were in full force and effect before, at the time of the filing of said application of relator to purchase the same, and *has* so remained ever since to the present time. That while said land was detached, it being, as a matter of fact, *grazing land* and not *agricultural* land, respondent avers that he had no power to sell the same under article 4218*y* of the act of 1897, p. 187. This being his construction of the law, he refused to award said land to relator on his said application. Respondent further says that if the above construction of the law is wrong, then he further says that no writ of mandamus should be granted against him as to said N. ½ section of land, because the law gives him a discretion as to whether he will sell said land or not, which discretion cannot be reviewed by the court. That it would be inequitable and unjust to the State to compel respondent to award said land to relator at the price of one dollar per acre when the fair reasonable market value of the same is not less than $2 per acre.

2nd. Respondent says that the said N. ½ section of land was lawfully classified and valued under the act of 1897, p. 84–'5, as watered grazing land and valued at $2.50 per acre. That on May 11th, 1897, said land on and in accordance with said classification * * * and valuation was lawfully sold to one McHenry Winburn. That said sale was in all things valid and vested the title to said land in the said Winburn; that on July 20th, 1899, the said Winburn having failed to pay the annual interest due the State on his pur-
8 chase of said land, on said day, respondent, as commissioner of the general land office, in strict conformity with law, duly and legally declared his said purchase of said land forfeited. That respondent, after said forfeiture, did not place said land on the market for sale until the 1st day of September, A. D. 1899, on which date he placed said land upon the market for sale as *grazing* land and valued at $2.00 per acre. That on said day in accordance with section 6 of the act of 1895,—Acts 1895, p. 64,—he notified in writing the county clerk of Jefferson county, Texas, *with* said N. ½ section of land was on the market for sale as grazing land at the value of $2.00 per acre. That until said notification was so sent to the county clerk, said land was not on the market for sale. That when relator made his said application to buy said land on August 11th, 1899, said land was not on the market for sale, and by reason thereof, relator had no right to buy the same and acquired no rights whatever by his application to purchase the same.

Third.

Respondent further says that the attempted purchase of said lands set forth in relator's petition was further illegal and void because he failed to accompany his applications to purchase said land with his affidavit to the effect that he desired to purchase the lands for a home and that he had in good faith settled on the same as is required by sec. 9 of the act of 1895,—see Acts of 1895, p. 65. That under said law said lands could only be sold to actual settlers. That relator had not settled on either of said tracts of lands and is now and was

at the time of his attempted purchase of said lands an actual resident of the city and county of Galveston, Texas.

Respondent further avers that by reason of all of the facts hereinabove stated that the attempted purchase of said lands by relator was and is absolutely null and void; and that by reason thereof he refused to award him said lands on his said applications to purchase the same.

Premises considered, respondent respectfully prays that the writ of mandamus be not granted against him as prayed for, and that he go hence without day, and that he have judgment against relator for all costs in this behalf expended.

T. S. SMITH,
Attorney General, and
R. H. WARD,
Office Ass't Att'y Gen.,
Attorneys for Respondent.

9 "EXHIBIT A."

Application and Affidavit to Purchase Detached Lands.

GALVESTON, TEXAS, *Aug.* 9, 1899.

To Hon. Charles Rogan, commissioner general land office:

I hereby apply to purchase, under the provisions of "An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, and the several asylums, and the lease of such lands and of the public lands of the State, and the patenting of any part of the said lands for church, cemetery or school-house sites, and to prevent the free use, occupancy, unlawful enclosure, or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor," as provided for in title LXXXVII, chapter twelve A, of the Revised Civil Statutes of 1895, and the amendments thereto by the act of May 19, 1897, the following lands situated in Polk county, Texas, about — miles (give course) — from county site, agreeing to pay for same the price per acre below specified:

Section.	Township.	Block.	Certificate.	Grantee.	Acres.	Price per acre.	Classification.
30	.....	.....	25/1280 Covers	H. & T. C. R'y... P—269—Polk & Ty	640 ler.	1 00	

For the purpose of securing the said land and of complying with the law regulating the sale of the same, I hereby make and subscribe to the following oath, to wit:

I P. O. Weber do solemnly swear that I am buying this said land for my own use and not for any other person or corporation, and that said land is not occupied by any one, that my post-office address is Galveston in Galveston county, State of Texas.

(Signed) P. O. WEBER, *Applicant.*

Subscribed and sworn to before me, this 9th day of August, 1899.

[SEAL.] ——, —— *County, Texas.*

Obligation.

$624.00. School lands.

For value received, I, the undersigned, do promise to pay to the State of Texas the sum of six hundred & twenty-four dollars, with interest thereon as hereinafter specified, the same being for the balance of purchase-money for the following-described tract of land, purchased by me this day of the State of Texas, in accordance with the provisions of "An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, and the several asylums, and the lease of said lands and of the public lands of the State, and the patenting of any part of said lands for church, cemetery or school-house sites, and to prevent the free use, occupancy, unlawful enclosure, or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor," as provided for in title LXXXVII, chapter twelve A, of the Revised Civil Statutes of 1895, and the amendments thereto by the act of May 19, 1897, to wit: all of section No. 30, block —, township — in Polk county, surveyed for the public school by the virtue of certificate No. 25/1280 issued to the H. & T. C. R'y.

The annual interest of three per cent. upon all unpaid principal, together with one-fortieth of the original principal, I am to pay or cause to be paid to the State treasurer, at Austin, Travis county, Texas, on or before the first day of each November thereafter, until the whole purchase-money is paid. And it is expressly understood that I am to comply strictly with all the conditions, limitations and requirements, and am subject to, and accept all the penalties contained and prescribed in the above-recited act.

Witness my hand this 9th day of Aug. A. D. 1899.

P. O. WEBER.

Wrote 9, 27, '99 Rog.

This application is rejected because applicant applies for same at $1.00 per acre $\frac{1}{40}$ cash & executing his obligation for $\frac{39}{40}$ of same.

This land under act of 1887 was classified as pine timber and valued at $8.00 per acre & that being the classification & valuation on the date of the filing of this application a sale at $1.00 is declined.

9, 23, '99.

K.

[Endorsed.]

No. 58809.

Application of P. O. Weber, Galveston, to Purchase Detached Land.

640.

Section.	Block.	Certificate.	Township.	Grantee.
30	....	25/1280	....	H. & T. C. R'y.

In Polk county.
Received Aug. 11, 1899.
Awarded —— —.
Rej. & refund.

—— ——,
Commissioner General Land Office.

[Written across face in pencil:] Detached 11, 13, '99 Crum.

Pine timber &c.
Roll ——.
Abst. ——.
Class G.
Appr'm't 1.—8.00. Over.
Appl'n ——.
Oblig'tion ——.
Seal ——.
Map ——.
Lease ——.

GENERAL LAND OFFICE, AUSTIN, TEXAS, *Nov.* 13, 1899.

I, Charles Rogan, commissioner of the general land office of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original, together with all the endorsements thereon now on file in this office.

In testimony whereof, I hereunto set my hand, and affix [SEAL.] the impress of the seal of said office the date last above written.

CHARLES ROGAN,
Commissioner General Land Office.

10 "EXHIBIT B."

Application and Affidavit to Purchase Detached Lands.

GALVESTON, TEXAS. *Aug.* 5, 1899.

To Hon. Charles Rogan, commissioner general land office:

I hereby apply to purchase, under the provisions of "An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, and the several asylums, and the lease of such lands and of the public lands of the State, and the patenting of any part of the said lands for church, cemetery or school-house sites, and to prevent the free use, occupancy, unlawful enclosure, or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor," as provided for in title LXXXVII, chapter twelve A, of the Revised Civil Statutes of 1895, and the amendments thereto by the act of May 19, 1897, the following lands situated in Jefferson county, Texas, about — miles (give course) — from county site, agreeing to pay for same the price per acre below specified:

Section.	Township.	Block.	Certificate.	Grantee.	Acres.	Price per acre.	Classification.
N. ½ 202	... .	.....	205	Tex. & N. O. R'y. O K.	320	1 00	

For the purpose of securing the said land and of complying with the law regulating the sale of the same, I hereby make and subscribe to the following oath, to wit:

I P. O. Weber do solemnly swear that I am buying this said land for my own use and not for any other person or corporation, and that said land is not occupied by any one, that my post-office address is Galveston in Galveston county, State of Texas.

(Signed) P. O. WEBER, *Applicant.*

Subscribed and sworn to before me, this 9th day of August 1899.

B. K. GOREE,

[SEAL.] *Notary Public, Galveston County, Texas.*

Obligation.

$312.00. School lands.

For value received, I, the undersigned, do promise to pay to the State of Texas the sum of six hundred & twenty-four dollars, with interest thereon as hereinafter specified, the same being for the balance of purchase-money for the following-described tract of land, purchased by me this day of the State of Texas, in accordance with the provisions of "An act to provide for the sale of all lands hereto-

fore or hereafter surveyed and set apart for the benefit of the public free schools, and the several asylums, and the lease of said lands and of the public lands of the State, and the patenting of any part of said lands for church, cemetery or school-house sites, and to prevent the free use, occupancy, unlawful enclosure, or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor," as provided for in title LXXXVII, chapter twelve A, of the Revised Civil Statutes of 1895, and the amendments thereto by the act of May 19, 1897, to wit: all of section No. N. ½ 202, block —, township — in Jefferson county, surveyed for the public school by the virtue of certificate No. 205 issued to the T. & N. O. R'y.

The annual interest of three per cent. upon all unpaid principal, together with one-fortieth of the original principal, I am to pay or cause to be paid to the State treasurer, at Austin, Travis county, Texas, on or before the first day of each November thereafter, until the whole purchase-money is paid. And it is expressly understood that I am to comply strictly with all the conditions, limitations and requirements, and am subject to, and accept all the penalties contained and prescribed in the above-recited act.

Witness my hand this 9th day of Aug. A. D. 1899.

P. O. WEBER.

Wrote 10, 5, '99—Rog.

This land was sold to McHenry Winburn, May 11, 1897, on the classification & valuation made under the act of 1887, which was watered, grazing land, valued at $2.50 per acre. Said sale was forfeited for non-payment of interest July 20th 1899, and this department on Sept. 1st 1899 placed this land on m'k't as grazing land, valued at $2.00. This application must be rejected for two reasons:

1st. At the date of filing this application Aug. 11, 1899 this land was not on market, and an application to purchase must date after land is placed on the market.

2d. This land is classified as grazing land & valued at $2.00 per acre, hence, the application at one dollar is declined.

9, 23, '99.

K.

[Endorsed.]

No. 58795.

Application of P. O. Weber, Galveston, to Purchase Detached Land.

320.

Section.	Block.	Certificate.	Township.	Grantee.
N. ½, 202	.....	O K. 205	.....	Tex. & N. O. R'y.

In Jefferson county.
Received Aug. 11, 1899.
Awarded —— —.
Rej. & refund.

—— ——,
Commissioner General Land Office.

Roll ——. 7, 20, '99.
Abst. 41484. Not on market.
Class G—O K.
Appr'm't 1—$2.00.
Appl'n ——.
Oblig'tion ——.
Seal ——.
Map O K. Over.
Lease ——.

GENERAL LAND OFFICE, AUSTIN, TEXAS, *Nov.* 13, 1899.

I, Charles Rogan, commissioner of the general land office of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original, together with all the endorsements thereon now on file in this office.

In testimony whereof, I hereunto set my hand, and affix [SEAL.] the impress of the seal of said office the date last above written.

CHARLES ROGAN,
Commissioner General Land Office.

11 Endorsed: No. 838. P. O. Weber, relator, *v.* Chas. Rogan, com., respondent. Respondent's original answer. Filed in supreme court Jan. 8, 1900. Chas. S. Morse, clerk.

Order of Submission.

P. O. WEBER
vs.
CHAS. ROGAN, Commissioner. } No. 838. Petition for Mandamus.

Jan. 8, 1900.—Submitted on briefs and oral arguments for both parties.

Opinion of Supreme Court.

Filed Jan. 22, 1900.

P. O. WEBER, Relator,
vs.
CHARLES ROGAN, Commissioner, Respondent. } No. 838. Petition for Mandamus.

This is an original action for a writ of mandamus brought by the relator against the commissioner of the land office to compel the respondent to award to the relator two parcels of school lands which

he had made application to purchase. The allegations in the petition are not denied. From these allegations, it appears that on the 11th day of August, 1899, the two tracts of land,—one lying in Jefferson county and consisting of 320 acres, and the other situate in Polk county and embracing 640 acres,—were unappropriated public free-school lands, and were "isolated and detached" within the meaning of the act of May, 1897, with reference to the sale of the public free-school lands; and that on that day the relator filed an application to purchase each of these parcels at the price of $1 per acre. Each of these applications was in due form and was
12 accompanied by a tender of one-fortieth of the purchase-money and by the relator's obligation for the payment of the balance as provided by the law then in force. It was also averred that the respondent had refused to award him the lands.

The respondent for answer admits that the relator made application to purchase the lands, as averred by him in his petition, but avers in substance that under the law in force at the time the applications were made, the section in Polk county had been classified as timbered land and had been appraised at $8 per acre, and also that the half section had been classified as grazing land and had been appraised at $2.50. He claimed that because they were not agricultural lands, they were not subject to sale as "isolated and detached sections" under the law existing at the time the applications were made. In regard to the latter tract, it was also averred that it had previously been sold, but that he, as commissioner of the general land office, on the 20th of July, 1899, had declared the title of the purchaser forfeited for non-payment of interest, and that he did not again place it upon the market until the 1st of September thereafter. He therefore claimed that at the time of the application that the tract last mentioned was not subject to sale, for the reason that it had not been again placed upon the market. The allegations of the answer were excepted to but were not denied.

At the time the applications to purchase were made, the following law was in force: "The commissioner of the general land office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter." (2 Batts' Rev. Stat., art. 4218*y*.) The determination of
13 the case before us depends upon the construction of this statute. If by this law it is made the imperative duty of the commissioner of the general land office to sell all isolated sections and parts of sections of the public free-school lands to the

first applicant without regard to their classification, then the writ here applied for should be awarded; otherwise, it should be denied.

Upon first impression, we were inclined to the opinion that the provision in question was directory and not mandatory. We recognize the rule announced by the late Chief Justice Stayton, in Smisson *v.* The State (71 Texas, 236) in the following language: "The word 'may' in the connection used in the sixteenth section was doubtless used in the sense of 'shall' and therefore was mandatory. Such is the settled construction where the subject-matter is one in which the public have an interest to be protected or promoted by the exercise of a power or performance of a prescribed duty by a public officer, unless the context shows that the word was used in its primary signification." The difficulty with the article is that the context tends in some degree to show that the word "may" in the last provision was used in its primary sense. The article begins by using the same word in the sense of permission, then it uses the word "shall"—an undoubted word of command—and then returns to the use of the word "may." If we had nothing but the letter of the article to throw light upon the intention of the legislature, we therefore think it would be difficult to say that the word "may" was not used in the same sense in the second instance as it was used in the first. But when we review the history of the provision, the difficulty disappears. The provision for the sale of "the isolated and detached" sections or parts of sections of the public free-school lands first appeared as section 22 of the act of April 1, 1887, in relation to the classification, lease and sale of the State's lands set apart for the benefit of the free schools, the university and the asylums of the State. That section reads as follows: "The commissioner of the general land office, under the direction of the governor, may withhold from lease any agricultural lands necessary for purposes of settlement, or, in his discretion, he may lease such agricultural lands in small quantities for a less period than five years, as the public interest and development of the country may seem to require; and no agricultural lands shall be leased if in the judgment of the commissioner they may be in immediate demand for settlement, but such
14 lands shall be held for settlement and sold to actual settlers only, under the provisions of this act; and all sections or fractions of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos and Presidio counties, which sections are detached and isolated from other public lands, may be sold to any purchaser, except to a corporation, at not less than two dollars per acre, upon such terms as the commissioner of the general land office may prescribe." This section was amended by section 26 of the act of May 4, 1895, but so much thereof as related to the sale of detached sections was left unchanged. Section 26 appears in the Revised Statutes of 1895 as article 4218y. It was amended in 1897, and, as so amended, was the law in force at the time the relator applied for the purchase of the lands in controversy. It thus appears that until this article was amended by the act of 1897, the commissioner had a discretion both as to the

terms of the sale and as to the price, subject, however, to a minimum limit. The article so amended took away all discretion as to the terms of the sale by providing that the sale should be "upon the same terms as other public lands are sold under the provisions of this chapter." (The chapter meant is chapter XII, A of title LXXXVII.) And it is very clear to our minds that if it had not been intended to take away all discretion as to the price, the legislature, instead of using the words "at one dollar per acre," would have said "at not less than one dollar per acre,"—the form of expression used in the very article they were amending. By changing the language from the words "not less than two dollars per acre" to the words "at one dollar per acre," they must have intended not only to reduce the minimum to one dollar per acre but also to fix the price at that sum. Such seems to have been the construction put upon the act by the next legislature for in 1899 the article was again amended so as to read "at not less than one dollar," &c. (Laws 1899, p. 235.) This last act had not gone into effect when the applications to purchase in this case were made.

It is to be observed that the provision in question only applied to lands lying in counties which had been organized before January 1, 1875. Isolated sections and parts of sections of such lands had long been upon the market when the act which embraced this pro-
15 vision was passed, and had remained unsold. The presumption was that they were of little value and not marketable under the general provisions of the act. They were like the unsold remnants of a stock of merchandise,—not sold because not saleable, upon the terms and conditions upon which the bulk of the stock had been sold. This consideration doubtless impelled the legislature to enact the special provision for the sale of detached lands. Therefore, in the original act, they removed all restrictions save as to a minimum price, and provided that such lands should be sold at such price not below $2 per acre and upon such terms as the commissioner of the land office might prescribe. It was ten years after the passage of the first act which conferred this power upon the commissioner that the amendment was passed which was in force when the relator made application to purchase the lands in controversy in this case. The consideration which led to the first action of the legislature bore with greater force at the time the amendment was adopted. The legislature doubtless then felt that the previous law had been inadequate for the disposition of these remnants of public free-school lands and that to effect a sale, it was necessary not only to lower but to fix the price and to take away all discretion in the premises from the commissioner. The history of the legislation and the circumstances surrounding its subject-matter impel to the conclusion that the purpose of the 25th legislature, in passing the amendment of 1897, was to make it the duty of the commissioner of the general land office to accept all bids for isolated sections and parts of sections of the school lands at a dollar an acre, upon the purchasers tendering the part of the purchase-money and the obligation for the balance, as was required by the general law.

COPY BOUND CLOSE IN CENTER

But it is urgently contended that the provision applies only to agricultural lands, and that since the parcels in question have been classified, the one as timbered and the other as grazing lands, the relator acquired no right by his applications. This contention is based upon the fact that the first provision in the article is expressly applicable to the agricultural lands. The argument is that this shows that in adopting the article in question, the legislature had in mind only the agricultural lands and that therefore the words "all sections and fractions of sections" meant all sections and fractional sec-
16 tions of agricultural lands. We cannot concur in the proposition. We attach no importance to the fact that the provision about agricultural lands and that about detached parcels are found in the same section of the law. It is undoubtedly the custom to embrace provisions relating to divers matters in the same section or article of a statute and there can be no objection to the practice provided all relate to the same general subject named in the title of the act. In the provision in controversy, the legislature say "all sections and fractions of sections," and the words mean, literally, all such sections and fractions without regard to their classification as agricultural, grazing or timbered lands. We think they meant what they said. In the original act, the section which contains the provision as to isolated and detached lands is nearly the last. The previous twenty-one sections contained full regulations for the sale and lease of the free school and asylum lands. When this was done, there remained certain exceptions to be provided. The constitution required the lands to be sold and hence it was deemed proper to authorize such of them to be held for sale as were in immediate demand for actual settlement. Also, as has been previously shown, in order to effect a sale of "isolated and detached sections and fractions of sections" of the lands, it was expedient to except them from the general rule and to make special provision for the sale thereof. Not only was there no incongruity in providing for both of these exceptions in one section, but it seems to us that it was a natural and logical method of making the provisions. In the original section perhaps the most important provision in regard to the isolated lands is that any person, not a corporation, could be a purchaser. All other lands were to be sold to actual settlers only. Surely the lands most desirable for settlement and most likely to be applied for by actual settlers were those adapted to the purposes of agriculture. It therefore seems to us that if the legislature had desired to except either class from the operation of the provision, the agricultural lands are the last they would have excepted, for so far as we can see, every consideration which impelled them to except the isolated and detached sections from the general rule laid down by the statute, applied with more force to the timbered and grazing lands than to the agricultural sections.

17 But as to the half section situate in Jefferson county, there is another question to be determined. After the commissioner had declared that parcel forfeited, was it necessary that the forfeiture should be reported to the county clerk of the county in which the land is situate before it was again subject to purchase?

The provisions in general of the chapter regulating the sale of the public school and asylum lands, do not apply to the "isolated and detached sections and fractions of sections." As already seen, they required no classification; nor was any appraisement necessary as a condition precedent to their sale. Before the amendment of 1897, the commissioner fixed the price at not less than $2 per acre. Under that amendment, the law fixed it absolutely at $1, and directed that the lands should be sold upon the same terms as other public lands were sold, under the provisions of the chapter of which it was made a part. By "terms" are meant the times of the payment of the installments of the purchase-money and the rate of interest on the deferred payments. It does not mean under the same regulations, because, as we have seen, no regulations were necessary. The law having fixed the price and terms of sale, all that was necessary to acquire an inchoate title was to make application to the commissioner and to tender the proportion of the purchase-money required by the law to be paid in cash, together with the statutory obligation for the balance. (Jumbo Cattle Co. *v.* Bacon & Graves, 79 Tex. 5.)

We think the writ of mandamus should issue as prayed for and it is accordingly so ordered.

R. R. GAINES,
Chief Justice.

Judgment of Supreme Court.

Entered Jan. 22, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent. } No. 838. Petition for Mandamus.

Opinion delivered by Chief Justice GAINES:

On the 8th day of January A. D. 1900, the above cause was
18 called for trial, whereupon the relator, P. O. Weber, appeared by his attorneys, M. E. Kleberg and Ashby S. James, and the respondent Chas. Rogan, commissioner of the general land office, appeared by his attorneys, Thomas S. Smith, attorney general of Texas, and R. H. Ward, office assistant,—both parties announced ready for trial. The cause was submitted to the court on said date—and after due consideration thereof, because it is the opinion of this court that the writ of mandamus herein should issue, it is therefore considered, adjudged and ordered that the clerk of this court do issue a peremptory writ of mandamus as prayed for, directed to the respondent, Chas. Rogan, commissioner of the general land office of the State of Texas, commanding him to issue his award of sale to said P. O. Weber for the two surveys of land purchased by said P. O. Weber from the State of Texas, for which said relator has heretofore duly filed his application, said lands so purchased by said relator, P. O. Weber, being described as follows, to wit:

I. Six hundred and forty acres of land situated in Polk county, Texas, and surveyed for the public free-school fund by virtue of cer-

tificate No. 25/1280, issued to the H. & T. C. R'y Company being survey No. 30.

II. Three hundred and twenty acres of land in Jefferson county, Texas, surveyed for the public free-school fund by virtue of certificate No. 205, issued to the Texas & New Orleans R'y Co., being the north half of survey No. 202.

It is further ordered that the relator, P. O. Weber, recover of the respondent, Chas. Rogan, commissioner of the general land office of the State of Texas, all costs in this behalf expended and incurred. (Set aside March 8, 1900.)

Respondent's Motion for Rehearing.

Filed February 3, 1900.

In the Supreme Court of Texas, October Term, A. D. 1899.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Comm'r, *Relator.* } No. 838.

19 Now comes Charles Rogan, respondent herein, and moves the court to set aside its judgment rendered herein awarding a peremptory writ of mandamus against him, and to grant him a rehearing, for the following reasons, to wit: Because

First. The court erred in holding that art. 4218*y* of the act of 1897 made it the duty of the commissioner of the general land office to accept all bids for isolated sections of the school lands at a dollar per acre, upon the purchasers tendering the part of the purchase-money and the obligation for the balance as was required by the general law. Respondent alleges that when said article is construed with reference to all other parts of the law and in connection with the great injury done the State and to other lessees and purchasers of school land, by such construction, the intent of the legislature becomes manifest that it was intended to vest in the commissioner a discretion as to the sale of isolated sections of school land.

Second. The court erred in holding that the half section of land in Jefferson county, under the facts, was subject to purchase before the land was put upon the market for sale by the commissioner of the general land office.

Third. The court erred, under the law and facts stated, in holding that relator was entitled to purchase the land in controversy, and in awarding a peremptory mandamus against respondent requiring him to sell said lands to relator.

Respondent represents that Ashby S. James, who resides in the city of Austin, Travis county, Texas, and M. E. Kleberg, who resides in the city of Galveston, Galveston county, Texas, are the attorneys of record for relator.

Respondent prays that the court will grant him a rehearing

herein and on such rehearing refuse to award a writ of mandamus against him.

T. S. SMITH,
Attorney General, and
R. H. WARD,
Ass't Att'y Gen.,
Attorneys for Respondent.

Endorsed: Mo. No. 740—No. 838. In the supreme court. P. O. Weber, relator *vs.* Chas. Rogan, commissioner general land office, respondent. Respondent's motion for rehearing. Filed in supreme court February 3rd, 1900. Chas. S. Morse, clerk, by F. T. Connerly, deputy. T. S. Smith, att'y gen'l and R. H. Ward ass't att'y gen'l, attorneys for respondent.

20 *Precept.*

The State of Texas to the sheriff of Galveston county, Greeting:

You are hereby commanded that you serve upon M. E. Kleberg, attorney of record for relator in the case of P. O. Weber, relator, *vs.* Chas. Rogan, com'r, respondent, the accompanying certified copy of motion for rehearing made by T. S. Smith, attorney general, and R. H. Ward, assistant attorney general, attorneys of record for respondent in said cause, now on file in this office.

Herein fail not, but of this writ make due return, under the penalty prescribed by law, with your indorsement thereon, showing how you have executed the same.

Witness, the Hon. Reuben R. Gaines, chief justice of our said supreme court, with the seal thereof annexed, at Austin, this the 6th day of Feb'y, 1900.

[SEAL.]

CHAS. S. MORSE, *Clerk,*
By F. T. CONNERLY, *Deputy.*

Endorsed: Supreme court, Austin. P. O. Weber *vs.* Chas. Rogan, com'r. No. 838. Precept. Issued Feb'y 6th, 1900. Chas. S. Morse, clerk. By F. T. Connerly, deputy. Sheriff's return. Came to hand February 8th, 1900. Executed February 9th, 1900, by delivering to the within-named M. E. Kleberg, attorney of record for relator, in person, the accompanying certified copy of motion. Henry Thomas, sheriff Galveston county. By W. E. Thomas, deputy. Sheriff's fees, $1.00. Received back 2/11/1900.

21 *Opinion Granting Motion for Rehearing.*

Filed March 8, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent.
} Mo. No. 740. Petition for Mandamus.

The motion and argument for a rehearing contains much matter which would have been very properly addressed to the legislature

while it had under consideration the statute which gave rise to this suit; but which is hardly proper to address to a court which is called upon to construe the law. If there was any provision of the constitution which prohibits the legislature from passing improvident laws, we would most likely be amply justified in disregarding the law in question.

However, the motion calls our attention to certain provisions of the Revised Statutes in relation to the sale of timber upon the school lands and the timber lands themselves, which are claimed to be inconsistent with the idea, that the article in reference to "isolated and detached" sections was intended to apply to the timbered lands. This presents a point which was not presented upon the argument at the hearing and upon which further argument is appropriate. The motion for a rehearing is therefore granted and the cause will be set down for argument upon such day as may be agreed upon by the parties, with the consent of the court.

R. R. GAINES,
Chief Justice.

Judgment Granting Motion for Rehearing.

March 8, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent. } Mo. No. 740. Petition for Mandamus.

Opinion delivered by Chief Justice GAINES:

In this cause it is ordered that the motion of the respond-
22 ent for a rehearing, be granted,—that the judgment heretofore entered on Jan. 22, 1900, be set aside and the cause be set down for argument on point indicated in the opinion this day filed, for some day to be agreed upon by counsel, with the consent of the court.

Order on Resubmission.

April 9, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent. } No. 838. Petition for Mandamus.

Resubmitted on briefs and printed and oral arguments for both parties.

Opinion Refusing Writ of Mandamus.

Filed June 28, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent. } No. 838. Petition for Mandamus.

The argument for the respondent, upon the second submission of this case, has placed the matter in a new light and has led us to the conclusion that our former judgment was erroneous and that the writ of mandamus should be denied.

Our opinion is, that even if it be held that article 4218*y* applies to all lands alike, and if it takes away the discretion of the commissioner of the general land office to refuse a bid of one dollar per acre, yet the relator cannot have a judgment in this case as to the timbered section. That article prescribes that the lands therein designated shall be sold "upon the same terms as other public
23 lands are sold under the provisions of this chapter." There are no provisions in the chapter mentioned which are applicable to all lands alike. Timbered lands are to be sold for cash, and agricultural and pasture lands upon a long credit. So that, if the timbered sections be included in the article under consideration, the provision quoted admits of no reasonable construction save that the timbered sections are required to be sold as other timbered lands are authorized to be sold, under the provisions of the chapter, and the agricultural and pasture lands are to be sold as is provided in other articles for the sale of such lands; that is to say, the former for cash and the latter in equal annual installments extending over many years. This seems to us to be fatal in any event to the claim of the relator to the timbered section. If he had the absolute right to purchase the timbered section at $1 per acre, he could in no event have perfected his right to that land except by tendering the purchase-money in full. This he did not do.

But as to the half section of pasture land, the case is different. Under the statute, the pasture lands are saleable upon the same general terms as agricultural lands; and the relator having tendered one-fortieth of the purchase-money and his obligation for the payment of the thirty-nine additional annual installments, as required by the statute for the sale of such lands, was entitled to have the land awarded to him, provided the respondent was absolutely required to sell the land at one dollar per acre. Therefore, our conclusion as to the timbered section does not relieve us from the duty of reviewing our opinion upon the more important question and of determining whether or not the commissioner, under article 4218*y*, had a discretion to refuse an offer of one dollar per acre for sections of land which were isolated and detached.

In our former opinion, we held in effect, that the fact that the article under construction omitted the words "not less than" from section 22 of act of April 1, 1887, of which such article

was an amendment and for which it was a substitute, led to the conclusion that the purpose was to take from the commissioner of the general land office the discretion with which he was previously invested, to refuse the minimum price. The majority of the court are now of opinion that we erred in that conclusion. The rule is recognized that in the construction of statutes,
24 the history of previous legislation upon the subject should be considered, and that a change of language of a statute, by the omission or addition of one or more words, should ordinarily be presumed to have been made for a purpose. But the one controlling and effective rule of construction is that the intent of the legislature must govern. Every other recognized rule is subsidiary to this fundamental canon of construction and must yield when it is believed that its application would lead to a result contrary to that which the legislature actually intended. While the omission of the words "not less than" in the article we are considering tends to show that it was the intention of the legislature to deprive the commissioner of the power of fixing the price of isolated sections, it is not necessarily conclusive of that question. As indicated in our former opinion, if article 4218*y* of the act of 1887 had been the first provision upon the subject of the sale of isolated sections of the free-school lands, we should have felt constrained to hold that the word "may" as there used, was employed in the sense of permission and not of command, and this notwithstanding the well-recognized rule announced in the case of Smisson *v.* The State, there cited. Though it is a matter "in which the public have an interest to be * * * promoted by the exercise of a power * * * by a public officer" and though in such a case, it is the ordinary rule to construe "may" as meaning "shall," yet we thought that the context indicated that such was not the purpose. Such being the case, it is not unreasonable to presume that the legislature may have intended to use the word "may" in the ordinary sense of permission and have deemed it unnecessary to retain the words which were omitted in the former act. In that act, the word in question could not have been employed as a word of command, for the reason that by other terms employed the officer was empowered to reject any offer, in the event he deemed the price offered less than the value of the land.

Now it is to be noted that in every statute that has been passed which provides for the sale of the public lands, from the year 1883 down to the passage of the article under consideration, especial provision has been made for the sale of those which are chiefly valuable for the timber upon them. The act of April 12, 1883, provided that such lands should not be sold at less than five dollars per
25 acre, while other lands without water upon them were salable at a minimum price of two, and those with water at three dollars per acre. (Laws of 1883, p. 85.) Substantially the same provision is found in section 7 of the act of April 1, 1887. (Laws of 1887, p. 85.) That act also provides in substance that timbered lands shall be paid for in cash. The sections which contained these provisions were not amended by the act of April 8, 1889 (Laws 1889, p. 50); nor by that of April 29, 1891, (Laws of 1891, p. 180.) By

the act of April, 1895, the minimum price of agricultural lands was reduced to two dollars and that of pasture lands to one dollar per acre; but the minimum price of timbered land was left at five dollars, as previously fixed. This act also retained the provision that such lands should be sold for cash only. (Laws 1895, p. 61.) It also added the following section: "Sec. 16. The commissioner of the general land office shall adopt such regulations for the sale of the timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than five dollars per acre, cash, except in such cases as the commissioner may ascertain by definite examinations by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or part of sections at its proper value: Provided, such timber is sold at not less than two dollars per acre. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so, such timber shall thereby be forfeited to the State without judicial ascertainment; Provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold as agricultural or grazing lands, according to classifications to be made by the land commissioner: Provided, that the purchaser or his vendees of any such timber shall have the right to purchase the land upon which such timber so purchased is situated at two dollars per acre, cash, at any time before the expiration of five years from date of purchase of timber under the provisions of this act." All these provisions, in relation to the sale of timbered lands and of the timber thereon, were retained in the act of May, 1897, of which article 4218*y* constitutes a part. Now, conceding, for the purposes of the argument, that the previous laws
26 in regard to the sale of the detached sections applied to pasture and timbered lands as well as to agricultural lands,—such provisions are not inconsistent with the previous policy of the law in relation to timbered land as shown by our legislation upon the subject, for the reason that before the act of 1897, the commissioner was not bound to sell at a fixed sum, but had the liberty to refuse any offer which, in his opinion, was less than the value of the land. Rare instances might exist in which a tract might not be worth more than the minimum fixed by the act. In such cases, he was empowered to sell at that price; but it was not to be presumed that he would sell any land at less than its actual value. But to say that it was the intention of the legislature in making the amendment, not only to reduce the minimum price of the isolated sections to one-half of what it had been under the previous law, but also to deprive the commissioner of all discretion and to make it his absolute duty to sell at that price, is to attribute to them a purpose to make a radical departure from the previous course of legislation upon the subject and to attach a value to detached sections of timbered lands in no degree consistent with the value fixed by them and by other legislatures upon timbered lands, when not detached.

What may be the actual value of these detached lands, we do not know; nor have we the means of ascertaining their value. It appears, however, in this case, that the timbered section in controversy had been lawfully appraised at eight dollars per acre; and from this the presumption may be indulged that there were other sections which had been appraised at more and which were worth much more than one dollar per acre. Under these circumstances, to hold that the legislature intended to force the sale of these detached sections merely because they were detached at twenty per cent. of the price put upon timbered lands generally, is to attribute to them a degree of improvidence which ought not to be imputed when the language of the statute admits of any other reasonable construction.

For these reasons, the majority of the court are of opinion that the word "may" in article 4218*y* of the Revised Statutes ought to be construed in its literal sense,—that is to say, as a word merely conferring a power upon the commissioner to sell the lands therein specified at one dollar per acre and not as making it obligatory upon him to do so. I incline to our former opinion, but am also inclined to concur in the result but upon a different ground. But since my views are not those of the majority of the court, it would serve no useful purpose to express them here.

27

The writ of mandamus is denied.

R. R. GAINES,
Chief Justice.

Judgment Refusing Writ of Mandamus.

June 28, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent. } No. 838. Petition for Mandamus.

Opinion delivered by Chief Justice GAINES:

This day came on to be heard the application of P. O. Weber for a writ of mandamus, and the same having been duly considered, it is ordered that said application for writ of mandamus be and the same is, hereby refused; that the relator, P. O. Weber, pay all costs herein incurred, for which execution may issue.

Relator's Motion for Rehearing (Service Accepted).

Filed July 11, 1900.

In the Supreme Court of Texas.

P. O. WEBER
vs.
CHAS. ROGAN, Commissioner. } No. 838.

Plaintiff's motion for rehearing.

Now comes the plaintiff, P. O. Weber, and moves the court
28 to set aside the judgment rendered in this cause, refusing to grant the writ of mandamus, and to grant him a rehearing upon the following grounds:

I.

The court erred in holding that the word "may" in the last clause of article 4218*y*, was intended to be used by the legislature in a permissive sense and invested the commissioner of the general land office with power to sell isolated and detached sections, or fractional sections, of the public-school domain, at his discretion for any price not less than one dollar; for the following reasons:

(*a.*) Had such been the intention of the legislature, the amendment of said article, by the act of 1897, would have been made by striking out the word "two" and substituting therefor the word "one." This would have fully and intelligently accomplished this purpose; but such was not the amendment. The amendment struck out of the law of 1895, (art. 4218*y*, Revised Statutes, 1895) the words "at not less than two dollars" and inserted in lieu thereof the words "at one dollar;" thereby clearly evincing a purpose to change the minimum price to a fixed and unchangeable price and denying any and all discretionary power to the commissioner. This view is further strengthened by the fact that the amendatory act also deprived the commissioner of the power he had theretofore possessed to sell isolated lands "upon such terms as he might prescribe," and directed that the lands should be sold "upon the same terms as other public-school lands are sold, under provision of the law;" thus showing beyond controversy the purpose of the legislature to deprive the commissioner of all discretionary power.

(*b.*) In view of the constitutional requirement commanding the sale of all public-school lands, and the law carrying the same into effect, by which all school lands, not isolated and which require classification, shall be sold to actual settlers only in quantities not exceeding four sections to each settler; it is plain that the language of article 4218*y* in the act of 1897, means, and was intended to mean by the legislature, that all the isolated and detached sections, or fractions of sections of school lands, *must be sold*, and that in doing so, the sale "may" be made to any person whomsoever who will pay the

sum of one dollar per acre therefor, although such person is
29 not an actual settler. The word "may" in nowise relates to
the commissioner but applies exclusively to the purchaser. The language does not say that the commissioner "*may* sell;" but it says that the isolated sections shall be sold, and "may" be sold to any purchaser for the fixed price of one dollar per acre. All the school land shall be sold, those which are classified and not isolated, to actual settlers alone at not less than a minimum price fixed by the law; and those which are isolated and hence require no classification, "may" be sold to any purchaser though he be other than an actual settler.

(*c.*) If the construction adopted by the court be correct, then the commissioner may sell the isolated sections for a price not less than one dollar per acre to such person as he may select as an object of his favor or bounty. For the court holds that the commissioner may sell, or may not sell, to any applicant as he in his discretion may determine; thus giving him an opportunity to reward his friends and punish his enemies—a power at once repugnant to justice and destructive to equality before the law.

(*d.*) The construction adopted by the court is contrary to the well-recognized canon of statutory construction adopted in Smisson *v.* The State, 71 Tex. 222—holding that "may" is always used in the sense of "shall" where the subject-matter is one in which the public have an interest to be protected or promoted by the exercise of a power or performance of a prescribed duty by a public officer, unless the context shows that the word was used in its primary signification.

It plainly appears that the word "may" was not used in its primary signification for the reasons already stated.

(*e.*) That the legislature used the word "may" in the sense of "shall" appears conclusively from the emergency clause in the repealing act of 1899, repealing the act of 1897, in which the legislature gives as a justification and cause for the repeal, the very reason that the sale of this land which the act of 1897 required to be made, at the fixed price of one dollar, was to the detriment of the public-school fund. Nor is it an answer to this statement of the legislature that in the opinion of this court the act of 1897 was improvident
legislation; for the legislature itself, being a co-ordinate
30 branch of the government, is the exclusive judge of the
wisdom or improvidence of its legislation. So far as the record shows in this case, the legislation of 1897 fixing the price of isolated sections of school land at one dollar per acre, may not have been, and as is well known was not, at that time at all improvident. But the subsequent appreciation of the price of land under the general stimulus of prosperity throughout the entire country undoubtedly made it wise to pass the repealing act of 1899. For this reason the court cannot adopt as a safe canon of statutory construction, the value of the land in the year 1900.

(*f.*) That "may" was used in the sense of "shall" is further apparent from the fact that it is frequently so used throughout the entire statute, of which 4218*y* is a part. Thus it was apparent that

in the sixteenth section of the act under consideration by the court in Smisson *v.* State, providing that pasture lands and agricultural lands "may" be leased, the word "may" did not invest the commissioner with the power to lease or not as his discretion might dictate, but that "may be leased" meant "shall be leased." And again, in article 4218*f*, as amended in 1897, it is provided that in cases where lands have been forfeited that the purchasers may have their claims reinstated upon certain conditions.

Certainly every one will admit that the word "may" is there used in the sense of "shall" and that the commissioner would be without discretion to deny reinstatement to any purchaser who complied with the law.

Again, in section five of the act of 1895, the word "may" occurs twice in the proviso attached to said section, and is plainly used in the sense of "shall," as otherwise the sense of the section would be nullified.

II.

The court erred in holding that the relator is not entitled to have awarded to him the timbered section of land under any circumstances because he failed to tender one dollar per acre in cash for the same; for the following reasons:

(*a*.) There is no law that requires or directs that the commissioner or this court can or shall know that an isolated section bears grass or timber to distinguish it from any other isolated section.

31 The only lands upon which the law ascertains and the court knows, timber grows which are required to be paid for in cash by the statute, are such timbered lands as are not isolated and detached and which have been duly classified as timbered lands, and whose value has been fixed by appraisement. This is manifestly true for the statute divided public-school lands into two distinct divisions: One division embraces and places in a class, all isolated and detached sections whose price is fixed at one dollar per acre, and the other division embraces all other public-school sections. This last division is again divided, by personal inspection, and classed into "agriculture," "grazing," and "timbered" land and a minimum price is fixed upon each class under this division. With great particularity, the statute then fixes a method by which these lands shall be sold and the terms upon which these sales shall be made providing that all sales shall be upon forty years' time. Then by a proviso to the section fixing these terms of sale, it is enacted that for timbered land the purchaser shall be required to pay the full amount of the purchase-money at the time of his purchase.

Now, it is a universal rule of statutory construction that a proviso applies only to the particular section to which it is attached or at most, to such sections of the law as precede it. Applying this rule to the case in hand, we find that the timbered sections which shall be paid for in cash is "that timbered land" which is described and mentioned in the sections of the statute preceding this proviso, viz., land not isolated and detached but embracing larger quantities of land than one section, and which is required to be classified and

appraised. By no known rule of construction can this proviso be applied to isolated and detached sections which are mentioned in the subsequent article of the statute, and which are not classified and characterized either as timber, agriculture or grazing sections; therefore, when article 4218*y* directs that all isolated sections shall be sold at one dollar per acre upon "the same terms as other lands are sold under the provisions of this chapter," the terms referred to can only be those which apply generally to all public-school lands and not those which by inspection are confined to a particular class of land which in the very nature of things cannot form a
32 part of the lands which are isolated and detached. The law has not provided any machinery by which isolated lands can be classified, for the good reason that such classification would be useless and idle; inasmuch as the price of these lands is fixed at one dollar per acre. So that isolated lands are neither timbered, agriculture or grazing, but embraces *all* lands that are isolated—not *some*, but *all* isolated lands. There being no timbered lands which are isolated known to the law, it must follow that the price fixed by proviso for certain kinds of timbered lands, does not furnish the "terms" upon which isolated lands are to be sold.

6. The court holds in effect that "isolated sections" is not a distinct descriptive class—carried out of and subtracted from the three distinct descriptive classes of grazing, agriculture and timber classes. That an "isolated" section must be sold as one of these classes and at price and upon terms fixed *for* the three classes. It results that 4218*y* is in every sense a "dead letter," for it neither enlarges or restricts the provisions for sale of the three classes. And these provisions being held to control article 4218*y*, destroy it and no section can be sold without settlement at one dollar per acre.

(*b.*) But should the court however adhere to its opinion on this subject, then the relator tenders and offers to pay the sum of one dollar per acre in cash for the timbered section embraced in his application. And in this connection, the attention of the court is respectfully called to the fact that at the time of his application to the commissioner of the general land office for the timbered section in question, the application was not rejected upon the grounds that he failed to tender one dollar per acre in cash. Had such objection been made then, he would have tendered the cash; but the relator was required to make his application upon certain blanks or forms prepared by the commissioner of the general land office, and the said commissioner did not have, and could not, and did not furnish this relator with any blanks by which he was required or requested or notified to pay, in cash, the price of the so-called timber section in controversy; otherwise, he would have unhesitatingly done so. He submits, therefore, that he should not be denied this privilege now and his application being otherwise in due form, he requests that the court may fix a date by which he may pay in cash
33 the amount of money due for said section of land.

III.

By article 4218*y* of the act of 1897, the State of Texas offers to sell all isolated and detached sections and fractions of sections, of public-school lands, situated in counties organized prior to January, 1875, except in the counties of Presidio, El Paso, and Pecos, to any purchaser who will offer one dollar per acre therefor; payable one-fortieth cash and the balance in forty equal settlements, with interest thereon at the rate of three per cent. per annum, and who will execute his obligation for the deferred payments. Whenever this offer by the State is accepted, it becomes an executory contract between the State and such purchaser. It was error of this court, therefore, to hold that the commissioner of the general land office might refuse to execute this contract by declining to award such purchaser the lands applied for; for by so holding, the court gives to the statute an interpretation which violates the obligation of this contract and is repugnant to article 1, section 10, of the Constitution of the United States, forbidding the impairment of the obligation of contracts.

IV.

Hon. T. S. Smith, attorney general of the State of Texas, who now resides at Austin, Texas, is counsel for the respondent in this case, and relator prays that he be duly notified of this motion and that at a hearing thereof, relator be granted a rehearing.

All of which is respectfully submitted.

M. E. KLEBERG &
A. S. JAMES,
Counsel for Relator, P. O. Weber.

Endorsed: Mo. No. 798. P. O. Weber *v.* Chas. Rogan, com. Motion for rehearing. Filed in supreme court July 11, 1900. Chas. S. Morse, clerk, by F. T. Connerly, deputy. Overruled. We accept service of the within motion. Sept. 10th. T. S. Smith, attorney general.

34 *Order Overruling Motion for Rehearing.*

October 18, 1900.

P. O. WEBER
vs.
CHAS. ROGAN, Commissioner, Respondent. } Mo. 798. Petition for Mandamus.

This day came on to be heard the motion of the relator for a rehearing, and the same having been duly considered, it is ordered that said motion be overruled; that the relator, P. O. Weber, pay all costs of this motion.

Bill of Costs.

P. O. WEBER
vs.
CHAS. ROGAN, Comm'r. } No. 838.

Filing record	.50
Docketing cause	.50
Entering appearances	1.00
Filing briefs and arguments	7.80
Filing four extra papers	1.20
Filing and entering two motions	1.10
Entering judgment	1.00
Taxing costs	.50
Certified copy bill of costs	1.00
Recording two opinions	9.00
Orders	2.50
Issuing precept	1.00
Certified copy of motion	1.00
Sheriff's fees Galveston county	1.00
Total	$29.10

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Texas, holding sessions at Austin, Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Texas before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between P. O. Weber and Chas. Rogan, commissioner of the general land office of the State of Texas wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and a decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of or commission held under the United States and the decision was against the title, right and privilege or exemption, especially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said P. O. Weber, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal,

distinctly and openly, you send the record and proceedings
36 aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 15th day of April in the year of our Lord, one thousand nine hundred and one.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the Circuit Court of the United States in and for the Western District of Texas for the 5th Circuit,
By J. W. HANCOCK, *Deputy.*

April 15th 1901.
Allowed by
R. R. GAINES,
Chief Justice of the said Supreme Court of the State of Texas, at Austin, Texas.

Filed in supreme court April 15th 1901.
CHAS. S. MORSE, *Clerk.*

37 In the Supreme Court of the State of Texas, at Austin.

P. O. WEBER, Relator, *vs.* CHAS. ROGAN, Commissioner of the General Land Office, Respondent.	Original Application in the Supreme Court of Texas for a Writ of Mandamus.

Application for Allowance of Writ of Error.

To the Honorable R. R. Gaines, chief justice of the supreme court of the State of Texas:

Comes P. O. Weber by his attorney M. E. Kleberg and complains that in the records and proceedings, and also in the rendition of the judgment in a suit between P. O. Weber, plaintiff in error, and Charles Rogan, commissioner of the general land office of the State of Texas, defendant in error, in the said supreme court of the State of Texas, being the highest court of law or equity in the said State in which a decision could be rendered in said suit, and in which a final judgment was rendered against P. O. Weber on the eighteenth day of October A. D., 1900, and wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the title, right, privilege and exemption severally set up or claimed under the said clause of said Constitution, all of which appears from the records and proceedings in the said suit, manifest error hath happened, to the damage of the said

P. O. Weber; wherefore the said P. O. Weber by attorney prays for the allowance of writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

M. E. KLEBERG,
Attorney for P. O. Weber.

Allowed, April 15th, 1901.
R. R. GAINES,
Chief Justice.

Filed in supreme court April 15th, 1901.
CHAS. S. MORSE, *Clerk.*

38 *Writ of Error Bond.*

Know all men by these presents, that we, P. O. Weber as principal and —— —— —— —— as sureties, are held and firmly bound unto Charles Rogan, commissioner of the general land office of the State of Texas, jointly and severally in the full and just sum of one thousand dollars, ($1,000.00) to be paid to the said Chas. Rogan, commissioner as aforesaid, his attorney, executors, administrators or assigns; to which payment well, and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this the 12th day of April in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a term of the supreme court of the State of Texas in a suit depen ling in said court between P. O. Weber, plaintiff in error and Chas. Rogan, commissioner of the general land office of the State of Texas, defendant in error, a judgment was rendered against the said P. O. Weber and in favor of the said Chas. Rogan, commissioner of the general land office of the State of Texas, and the said P. O. Weber having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said Chas. Rogan, commissioner as aforesaid, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington within thirty days from the date thereof;

Now the condition of the above obligation is such, that if the said P. O. Weber shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

In testimony whereof, we have hereunto signed our names.

P. O. WEBER,
By his attorney, M. E. KLEBERG.
J. R. CORYELL.
JNO. H. RUBY.

April 15th, 1901.
Approved by
R. R. GAINES,
Chief Justice Supreme Court of Texas.

39 I, J. R. Coryell do swear that I am worth, in my own right, at least the sum of one thousand dollars ($1000.00) after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale and after the payment of all my debts of every description whether individual or security debts and after satisfying all incumbrances on my property which are known to me; that I reside in Harris county, State of Texas, and have property in said State liable to execution worth more than one thousand dollars ($1000.00).

J. R. CORYELL.

Sworn to and subscribed before me this 12th day of April A. D. 1901. As witness my hand and official seal.

[SEAL.]

R. H. HANNA,
Notary Public, Harris County, Texas.

I, Jno. H. Ruby, do swear that I am worth in my own right at least the sum of one thousand dollars ($1000.00) after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale and after the payment of all my debts of every description whether individual or security debts and after satisfying all incumbrances on my property which are known to me; that I reside in Harris county, State of Texas, and have property in said State liable to execution worth more than one thousand dollars ($1,000.00).

JNO. H. RUBY.

Subscribed and sworn to before me this 12th day of April A. D. 1901. As witness my hand and official seal.

R. H. HANNA,
Notary Public, Harris County, Texas.

Endorsed: P. O. Weber *vs.* Chas. Rogan, commissioner. Writ of error bond. Filed in supreme court of Texas April 15th, 1901. Chas. S. Morse, clerk.

40 *Citation in Error.*

United States of America to Chas. Rogan, commissioner of the general land office of the State of Texas, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Texas, at Austin, Texas, wherein P. O. Weber is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. R. Gaines, chief justice of the supreme

court of the State of Texas, at Austin, Texas, this 15th day of April 1901.

R. R. GAINES,
Chief Justice.

Attest: CHAS. S. MORSE,
Clerk Supreme Court of Texas.

Service of the above citation in error is hereby waived on behalf of the defendant in error, Chas. Rogan, commissioner of the general land office of the State of Texas.

Austin, Texas, April 15th, 1901.

C. K. BELL,
Attorney General of Texas, Attorney for Def't in Error.

Endorsed: P. O. Weber *vs.* Chas. Rogan, commissioner. Citation in error. Filed in supreme court of Texas April 15th, 1901. Chas. S. Morse, clerk.

41 *Assignments of Error.*

In the Supreme Court of the State of Texas, at Austin.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner of the General Land Office, Respondent.
} Original Application in the Supreme Court of Texas for a Writ of Mandamus.

Assignments of error.

1. Now comes P. O. Weber, plaintiff in error, by his attorney, M. E. Kleberg, and says, that in the record and proceedings aforesaid, there is manifest error in the judgment and decision of the supreme court of Texas, to wit:

The supreme court of Texas erred in holding that section 26 of the act of the legislature of Texas of 1895 as amended by the act of 1897, known as art. 4218*y*, of the Revised Statutes of Texas invests the commissioner of the general land office of Texas with any discretion to accept or reject an offer of $1.00 per acre for the lands described in said section of the law; and in not holding that by said section, the law offers for sale all such isolated and detached sections of school land at the fixed price of $1.00 per acre, and that when said offer is accepted by any person, in the terms of the law, that the same constitutes a complete contract between such purchaser and the State of Texas, which the commissioner has no power or right to change, abridge or deny.

2. By sec. 26 of the act of the Texas legislature of 1895 as amended by the act of 1897 being art. 4218*y* of the Revised Statutes of Texas, the State of Texas offered to sell all isolated and detached sections and fractions of sections of public-school lands situated in counties organized prior to January 1875, except in the counties of Presidio, El Paso and Pecos, to any purchaser who would offer $1.00 per acre therefor, payable one-fortieth ($\frac{1}{40}$) cash and the balance in thirty-

nine equal installments with interest thereon at the rate of 3 %
42 per annum, and who would execute his obligation for such deferred payments. When this offer by the State was accepted as was done by the plaintiff in error in the case at bar, such acceptance, as had been theretofore held in former decisions by the supreme court of Texas, constituted a contract between the State and such purchaser; and it was error of the supreme court of the State of Texas to hold that the commissioner of its general land office might refuse to execute said contract by declining to award such purchaser the lands applied for; for by so holding the court gave to the statute an interpretation which violates the obligation of a contract and is repugnant to art. 1, sec. 10 of the Constitution of the United States forbidding the impairment of the obligation of contracts. For the reasons assigned, the said P. O. Weber prays that the judgment of the supreme court of Texas may be reversed, and that the above-styled cause may be remanded to said supreme court with directions to issue its writ of mandamus to Charles Rogan, commissioner of the general land office of the State of Texas instructing him forthwith to make an award of sale of the lands applied for, to plaintiff in error.

M. E. KLEBERG,
Attorney for Plaintiff in Error.

Endorsed: P. O. Weber *vs.* Chas. Rogan, commissioner. Assignments of error. Filed in supreme court of Texas April 15, 1901. Chas. S. Morse, clerk.

43 CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the foregoing forty-two pages contain a true and correct copy of all the proceedings had in the supreme court of the State of Texas in cause No. 838 entitled P. O. Weber, relator *vs.* Chas. Rogan, commissioner of the general land office of the State of Texas, respondent,—pages thirty-five, thirty-six and thirty-seven thereof being the original writ of error and the original allowance of writ of error.

Seal Supreme Court of the State of Texas.

Witness my hand and the seal of the supreme court of the State of Texas, at the city of Austin this, the 29th day of April A. D. 1901.

CHAS. S. MORSE, *Clerk.*

Endorsed on cover: File No. 18,180. Texas supreme court. Term No. 107. Paul O. Weber, plaintiff in error, *vs.* Charles Rogan, commissioner of the general land office of the State of Texas. Filed May 24", 1901.